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EFFECTIVE FUNCTIONING OF BODIES ESTABLISHED PURSUANT TO UNITED NATIONS HUMAN RIGHTS INSTRUMENTS

Written statement submitted by Four Directions Council, a non-governmental organization in consultative status (category II)

The Secretary-General has received the following communication, which is circulated in accordance with Economic and Social Council resolution 1296 (XLIV).

[6 January 1992]

THE RIGHT TO PARTICIPATE IN PUBLIC AFFAIRS - A CONFUSING HUMAN RIGHTS COMMITTEE DECISION ON ARTICLE 25

1. We have the honour to circulate the following document, on behalf of the Sante Mawa'iomi wjit Mikmaq (Mikmaq Grand Council), concerning the decision of the Human Rights Committee in Marshall (Mikmaq Tribal Society) v. Canada No. 205/1986 (CCPR/C/43/D/205/1986), on 4 November 1991. We note that the Marshall case was originally submitted to the Committee in 1980, and that Kjisakamou Donald Marshall died in 1991, a year before the Committee made its decision - which was against him and his people. We also note that this matter has been discussed in some of the public sessions of the treaty bodies, and that the Mikmaq Grand Council advised the Commission on Human Rights of its accession to the Covenant on Civil and Political Rights in document E/CN.4/1988/NGO/37.

Background

2. The Mikmaq people are the original inhabitants of the Atlantic sea coast of Canada, which we call Mikmakik. We first heard about Europe from Norse explorers, who stayed with us in the eleventh century, and from Basque sailors, who fished with us in the fifteenth century. Between 1532 and 1752, we were trading partners and allies of France, and we became Catholics in 1610 under the terms of a treaty (or concordat) with the Holy See. In 1752, we entered into a treaty with Great Britain, which in 1985 the Supreme Court of Canada held is still in force and effect in that country. Under the terms of the treaty, we became subjects of the British Crown, but retained our own lands and traditional national government, which is the Grand Council.

3. In 1944 the Government of Canada "centralized" our settlements, in 1960 it divided us involuntarily into separate "bands" or communities, and in 1970 it purported to extinguish our fishing rights, on which we had always depended for our livelihood. In 1978 we submitted a claim for recovery of our lands and fisheries to the Government of Canada, but it was rejected on the pretence that all of our traditional rights had been "superseded by law". This compelled us to submit our claims to the Human Rights Committee, in 1980.

4. In 1982, Canada amended its Constitution to include, inter alia, a new article reaffirming "the existing aboriginal and treaty rights of the aboriginal peoples of Canada". From 1983 to 1987, the Government of Canada convened a series of constitutional conferences to negotiate a further amendment, clarifying the meaning of this phrase. The Prime Minister invited four non-governmental organizations to represent all of Canada's more than 40 original peoples. We asked to participate in these conferences on the basis of our recognition, by treaty, as a distinct nation, but we were refused. This denial was the basis of our revised communication to the Human Rights Committee in 1986.

5. The question before the Committee in Marshall, then, was whether a State may negotiate changes in the constitutional rights, or treaties, of an indigenous people, without that people's direct participation in the decision.

Decision on admissibility

6. The Committee's decision on admissibility (CCPR/C/39/D/205/1986) stated in paragraph 14.6 that:

> "The Committee believes that there are certain questions of law and facts relating to article 25 (a) of the Covenant that can only be determined on the merits. The Committee will have to address the issue whether or not the constitutional conference constituted a 'conduct of public affairs' and whether the right under article 25 (a) is available only to individual citizens, or to groups or representatives of groups also. In this context, the Committee would wish to know, in particular, the precise legal nature and scope of competence given to the constitutional conferences, as well as the criteria for participation therein."

Thus, the Committee ruled that the scope of the Mikmaq people's rights to participate in Canada's constitutional negotiations "can only be determined on the merits", that is, on the basis of the actual facts.

Decision on the merits

7. In its final views, the Committee stated as a general principle of law (paragraph 5.5):

> "Invariably, the conduct of public affairs affects the interests of large segments of the population or even the population as a whole, while in other instances it affects more directly the interest of more specific groups of society. Although prior consultations, such as public hearings or consultations with the most interested groups, may often be envisaged by law or have evolved as public policy in the conduct of public affairs, article 25 (a) of the Covenant cannot be understood as meaning that any directly affected group, large or small, has the unconditional right to choose the modalities of participation in the conduct of public affairs."

The Committee then concluded (in paragraph 6) that Canada's refusal to admit Mikmaq representatives to its constitutional conferences did not constitute either "discrimination" or an "unreasonable restriction" on the right of Mikmaq people to participate in public affairs.

Interpreting the decisions

8. The Committee's final decision appears to be inconsistent with its prior decision on admissibility, which stated that the right of groups to be represented in public decision-making is a question of fact to be determmined in each case. The Committee now appears to think that such rights do not exist under article 25 in any case as a matter of law.

9. Paragraph 5.5 denies the existence of any general right of groups to collective representation, while paragraph 6 implies that there is a right to be free from "discrimination" or "unreasonable restriction" in the exercise of the right to participate in the conduct of public affairs. Do these two statements, read together, mean that the Mikmaq (and other groups) have a "conditional" right to participate directly in the conduct of public affairs, the conditions being that the manner of their participation be "discriminatory" or "unreasonable"?

10. If a State party organizes the modalities of participation in such a way that certain groups, although affected, have no meaningful voice in the decision, is this not "discrimination"? Or if the State party arranges consultations so that some of the affected groups are invited while others are excluded, is this not "discrimination"? Does the phrase "unconditional right to choose the modalities of participation" mean that, when a group does have the right to participate in public decision-making, it is the State and not the group itself that has the right to choose the group's representatives?

11. Since Canada's constitutional conferences were aimed at redefining "aboriginal and treaty rights", they affected us, not as citizens (if such we are) but as an indigenous people in a treaty relationship with Canada. In

effect, participants in the conferences were renegotiating the treaty which governs the relationship between Mikmaq and Canada. Is it "unreasonable", in the light of these undisputed facts, to exclude Mikmaq from these negotiations?

12. The Committee's views could be interpreted as leaving the specific processes or "modalities" of participation entirely to the discretion of State parties. This, we believe, would be tantamount in effect to deleting article 25 (a) from the Covenant.

13. The Committee's decision implies that indigenous peoples have no right to representation, participation or self-government, other than those rights generally enjoyed by citizens. This is incompatible with the ILO Convention on Indigenous and Tribal Peoples in Independent Countries, 1989 (No. 169), and with the recognition of the special and collective character of indigenous rights by the General Assembly - most recently in its resolution 45/164, proclaiming the International Year for the World's Indigenous People.

14. We believe it is necessary for the Committee to clarify its views on article 25, in particular what is meant by "discrimination" in this context, and by "unreasonable restrictions", and we have communicated this concern to the Committee. In light of the extreme importance of democracy and the principle of "consent of the governed" to the global achievement of human rights, we also believe it would be for the best interests of all countries to seek clarification of the interpretation of article 25 from the International Court of Justice.